

1954

## National Trust Company, Ltd. V. Helen Duys et al : Respondent's and Contestant's Brief

Utah Supreme Court

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Beverly S. Clendenin; Fabian, Clendenin, Moffat & Mabey; Attorneys for Contestant-Respondents;

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1954

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

In the Matter of the Estate of FLOR-  
ENCE P. HOWARD, also known as F. P.  
HOWARD, *Deceased.*  
NATIONAL TRUST COMPANY, LTD.,  
as Administrator with the Will Annexed  
of the Estate of Robert Brown Ferrie,  
Deceased, and COLINA FERRIE,  
*Petitioners in Intervention  
and Appellants,*

HELEN DUYS, ETHEL FORREST,  
ERNEST F. HOWARD, THE PROTES-  
TANT BOARD OF SCHOOL COMMIS-  
SIONERS and MCGILL UNIVERSITY,  
MILDRED BLACK, HILDA BLACK,  
ROGER BLACK, RACHEL HELPS and  
WALKER BANK & TRUST COMPANY,  
a Utah Banking corporation, Executor of  
the Estate of Florence P. Howard, also  
known as F. P. Howard, Deceased,  
*Respondents.*

Cases No.  
8019 & 8021

RESPONDENT'S AND CONTESTANT'S BRIEF

FILED  
JUL 9 - 1954

BEVERLY S. CLENDENIN  
and FABIAN, CLENDENIN,  
MOFFAT & MABEY,  
*Attorneys for Contestant-  
Respondents.*

Clerk, Supreme Court, Utah

ROMNEY AND BOYER  
ATTORNEYS AT LAW  
WALKER BANK BUILDING  
SALT LAKE CITY 1, UTAH

JUNIUS S. ROMNEY  
HAROLD R. BOYER

June 28, 1954

Honorable Justices  
Supreme Court  
State of Utah  
State Capitol Building  
Salt Lake City, Utah

FILED  
JUN 29 1954

Clerk, Supreme Court, Utah

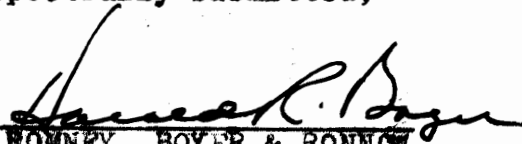
Gentlemen: Re: Petition for Rehearing  
Estate of Florence P. Howard,  
deceased. Case No. 7970

The primary interest of Walker Bank and Trust Company, as Executor, in this appeal is that of the jurisdiction of the trial court. This question was determined by the Supreme Court in its recent decision. The Appellants raised no question as to juris-

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rehearing. Therefore, on behalf of Walker Bank and Trust Company, as Executor, we see no necessity of filing a separate brief, but hereby adopt the Reply Brief of the Contestant Respondents, represented by Beverly S. Clendenin.

Respectfully submitted,

  
OF ROMNEY, BOYER & RONNOW  
Attorneys for Respondent,  
Walker Bank & Trust Company,  
Executor of the Estate of  
Florence P. Howard, deceased.

HOMER AND  
ATTORNEYS AT LAW  
WALTON BANK BUILDING  
SALT LAKE CITY, UTAH

JUNIUS R. ROMNEY  
HAROLD R. BOYER

June 28, 1954

Honorable Justices  
Supreme Court  
State of Utah  
State Capitol Building  
Salt Lake City, Utah

Violence E. Hornsby, deceased.  
Executor of the Estate of  
MAYNARD BANK & TRUST COMPANY,  
Attorneys for Heirs and Beneficiaries  
OF HORNBY, DECEASED.

Gentlemen: Re: Petition for the  
Estate of Violence E. Hornsby,  
deceased. CHAS. H. HORNBY admitted.

Violence E. Hornsby, deceased.  
Executor of the Estate of  
MAYNARD BANK & TRUST COMPANY,  
Attorneys for Heirs and Beneficiaries  
OF HORNBY, DECEASED.

## TABLE OF CONTENTS

	Page
State of the Record .....	1
Reply to Appellants' Arguments on Contest Decision.....	3
Contestants' Argument on Contest Decision.....	5
Point No. 1: The 1939 and 1940 Instruments were revoked by that of 1949 .....	5
Appendix "A".....	11

## TABLE OF CASES CITED

<i>Benson's Estate</i> , 145 Pac. 2d 668 .....	6
<i>Blackett v. Ziegler</i> , 133 NW 901 (Iowa).....	9
<i>Hunt's Will</i> , 81 NYS 2d 349.....	9
<i>In the Goods of Dennis</i> , (1891), Probate 326.....	9
<i>Kearns v. Roush</i> , 146 SE 729 (W. Va.).....	8
<i>Love's Estate</i> , 75 Utah 342, 285 Pac. 299 .....	8
<i>McClure's Estate</i> , 165 Atl. 24 (Pa).....	8
<i>Mallon's Estate</i> , 81 Pac. 2d 992.....	7
<i>Marques' Will</i> , 123 NYS 2d 877.....	9
<i>Martin's Estate</i> , 88 Pac. 2d 234 .....	7
<i>Neibling v. Methodist Association</i> , 286 SW 58 (Mo.), 51 ALR 639 .....	8
<i>Parson's Estate</i> , 237 Pac. 744 .....	4
<i>Paully v. Crooks</i> , 179 NE 364 (Ohio).....	8
<i>Pugh v. Parryman</i> , 58 So. 2d 117 .....	8
<i>Salmonski's Estate</i> , 238 Pac. 2d 966 .....	4
<i>Schillinger v. Bawek</i> , 112 NW 210 (Iowa).....	8
<i>Wuppermann's Estate</i> , 300 NYS 344 .....	9

## STATUTES

74-1-22, Utah Code Ann., 1953 .....	5
Utah Session Laws 1884, Sec. 22, Title 1, C XLIV.....	5
California Civil Code, 1872, Sec. 1296 .....	5

# IN THE SUPREME COURT of the STATE OF UTAH

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In the Matter of the Estate of FLOR-  
ENCE P. HOWARD, also known as F. P.  
HOWARD, *Deceased.*

NATIONAL TRUST COMPANY, LTD.,  
as Administrator with the Will Annexed  
of the Estate of Robert Brown Ferrie,  
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*Petitioners in Intervention  
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HELEN DUYS, ETHEL FORREST,  
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TANT BOARD OF SCHOOL COMMIS-  
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MILDRED BLACK, HILDA BLACK,  
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WALKER BANK & TRUST COMPANY,  
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known as F. P. Howard, Deceased,

*Respondents.*

Cases No.  
8019 & 8021

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## RESPONDENT'S AND CONTESTANT'S BRIEF

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### STATE OF THE RECORD

It may be well to summarize for the Court the situ-  
ation of the record now presented for review. These  
Respondents, Helen Duys, Ethel Forrest and Ernest  
Howard, called herein for convenience "Contestants"  
filed timely contest of the Order of the Probate Court

admitting to probate four (4) instruments executed by the Testatrix, (R. 131). In this contest they attacked the validity of the Order admitting to probate instruments executed in 1939 and 1940 on the ground that they had been revoked by an instrument executed in 1949, which in turn was supplemented by an instrument executed in 1952. The Trial Court held against Contestants, (R. 247) and against would be Intervenor (Appellants herein), (R. 196 and 247) and sustained the Order of the Probate Court. Intervenor, who sought to attack the 1949 instrument, took an Intermediate Appeal (Case No. 7970) in which this court Sustained the Order of the Trial Court and held that the 1949 instrument was no longer subject to attack or contest.

Following decision of the Trial Court in the contest attacking the 1939 and 1940 instruments Appellants herein appealed from such Order (Case No. 8019, R. 2). These Contestants were not served with a copy of Notice of such Appeal (Affidavit filed this Court November 25, 1953) and shortly thereafter filed Notice of their Appeal from the Trial Court's Order (Case No. 8021, R. 3) and thereafter Appellants herein Cross-appealed in Case No. 8021, (R. 45).

This Court, on December 4, 1953, made its Order consolidating these two (2) cases for briefing and setting a time within which Briefs should be filed. Appellant's Brief has been filed and these Respondents (Contestants) now present their Brief on Appeal from the Trial Court's Order denying the contest and in answer to Appellant's arguments, as presented herein.



## REPLY TO APPELLANTS' ARGUMENTS ON CONTEST DECISION

Appellant's rely upon two (2) points in their Appeal: *First*, that the four (4) testamentary instruments above referred to are so inconsistent and irreconcilable they cannot constitute a will; and

*Second*, that the intention of the Testatrix was to revoke the previous instruments and to make only the instrument dated January 14, 1952 her Last Will and Testament. Our reply goes jointly to these contentions and we will not attempt to segregate.

This is a busy Court and we sincerely feel that matters once determined should not be re-argued, except perhaps by way of Petition for Rehearing. In its decision on Intervenor's Intermediate Appeal, Case No. 7970, the Court definitely established as the law of the case that the instruments of 1949 and 1952 had been duly admitted to probate; that such Order had not been timely contested; was final and not subject to further attack. Justice Wade, speaking for the Court and referring to the 1949 and 1952 instruments, revoking those of 1939 and 1940, says:

"The issue before the Court therefore was: Did the later wills revoke the earlier ones? Those were the only defects set up in the pleadings affecting the validity of the will which were timely filed."

Justice McDonough, in his concurring opinion, states:

"Therefore the 1949 and 1952 documents were admitted to probate without timely contest and the only issue before the Court at the time of the attempted intervention was whether the earlier

instruments were revoked by the later instruments."

(That is whether the 1939 and 1940 instruments were revoked by the 1949 and 1952 instruments.)

Appellants, by the questions raised herein on appeal are saying: *First*, that all instruments go out; and *Second*, that all except the 1952 instrument go out. It is, of course, the 1949 instrument they seek to eliminate. That question is absolutely foreclosed, as determined by this Court in sustaining the Trial Court, and we submit that it is not only unnecessary, but improper to again present it in this Appeal. It would appear that summarizing what has heretofore transpired is all that is necessary by way of answer to Appellant's Points 1 and 2.

This is not an action to construe a will or to determine what effect shall be given to various instruments. When an instrument has been admitted to probate and time for contest has expired it must be considered by the Court in making final distribution. In other words, all instruments may not now be attacked on the ground that they cannot constitute a will or that the 1949 instrument was revoked by that of 1952. These last two are now in good standing and beyond the place where either can be thrown out. They are subject to construction in connection with final distribution, but for better or for worse, they constitute either a whole or a part of Testatrix's Last Will and Testament.

The effect of such finality is well stated by the California Supreme Court in the cases of:

In re *Parsons Estate*, 237 Pac. 744;

In re *Salmonski's Estate*, 238 Pac. 2d 966.

# CONTESTANTS' ARGUMENT ON CONTEST DECISION

## POINT NO. 1

THE 1939 AND 1940 INSTRUMENTS WERE REVOKED  
BY THAT OF 1949.

Contestants filed timely contest attacking the Order of the Probate Court admitting the instruments of 1939 and 1940 as parts of the last will of decedent. This contest was grounded upon the contention that the 1949 instrument, being a complete testamentary disposition of Testatrix's entire estate revoked, automatically, prior testamentary instruments.

As to what will constitute a revocation other than express words, is specified in Section 74-1-22 UCA, the pertinent portion being, that a prior will is not revoked by a subsequent will unless the latter contains provisions wholly inconsistent with the terms of the former. This particular section was adopted by the Utah Territorial Legislature in 1884, as Section 22 of Title I, Chapter XLIV of the laws of that year and in turn had as a statutory antecedent Section 565 of Field's Draft of the New York Civil Code. This particular section of the Field's draft was adopted by California in 1872 as Section 1296 of the California Civil Code. The statutory history is briefly inserted because California has frequently passed on the question involved in this contest and appeal and such cases become particularly pertinent in view of this history.

The 1949 instrument did not contain words of revocation, so the question presented is whether it is, in the

words of the statute, "wholly inconsistent" with the 1939 and 1940 instruments, which Contestants contend it revoked. Obviously, Testatrix's complete and comprehensive will of 1949, which disposes of her entire estate was "wholly inconsistent" with any prior document because it left nothing upon which such prior document could operate. Some items covered by the 1939 and 1940 instruments were by the 1949 instrument duplicated; others were changed; and others were added as completely new bequests (see Appendix "A"), but in any event, the instrument constitutes the most complete and comprehensive disposition that Testatrix attempted to make. In a great many instances the later wills increased specific bequests, presumably due to the fact that Testatrix considered her estate to have increased in value. It is just the situation that the California Appellate Court is describing when in the case of:

In re *Benson's Estate*, 145 Pac. 2d 668 at 671 the Court says:

"Regardless of whether the subsequent will is *wholly* inconsistent with the terms of the former will, it constitutes a complete, valid new will of all the testator's property and not a mere modification thereof, and it therefore supersedes the first will and is controlling over it in the disposition of his estate. In re Estate of Shute, *supra*. It is immaterial that the last instrument contains the statement that 'I \* \* \* make this *codicil* to my will dated on or about January 17, 1938.' The last instrument is in fact a complete new will which disposes of the entire estate of the testator. A duly executed subsequent instrument which in

clear and unambiguous language disposes of all of the property in a manner wholly inconsistent with the provisions of the former will clearly leaves no portion of the original will operative for any purpose. Under such circumstances the subsequent instrument supersedes the former will and constitutes a new will which cannot be aided in any respect by reference to the former one."

Again the California Court, in the earlier case of:

In re *Martin's Estate*, 88 Pac. 2d 234 at 237 says:

"Section 72 of the Probate Code provides, 'A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the prior will. In other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will; \* \* \*.' It will be observed from examining exhibit 2 that its purpose is not to make supplemental provisions consistent with the former will in whole or in part, nor to dispose of other property, nor to amend and alter the prior dispositions, but on the contrary, it undertakes to make complete disposition of all of decedent's property. It is the law of California that if the later writing purports to make disposition of all of decedent's property, the earlier instrument is deemed to be wholly revoked."

To the same effect:

In re *Mallon's Estate*, 81 Pac. 2d 992.

Such rule of law is, of course, generally accepted and pronounced throughout this country. As examples of a few of the holdings to the same effect we give to the Court:

*McClure's Estate*, 165 Atl. 24 (Pa.);  
*Schillinger v. Bawek*, 112 NW 210 (Iowa)  
*Kearns v. Roush*, 146 S.E. 729 (W. Va.);  
*Paully v. Crooks*, 179 NE 364 (Ohio);  
*Neibling v. Methodist Association*, 286 SW  
58 (Mo.).

The last cited case likewise appears in 51 ALR 639 where there is an extensive note on this question, commencing at Page 652. This annotation is most comprehensive and deals with numerous allied situations, but does support the rule of law herein adverted to, that a complete disposition of an estate revokes previous instruments regardless of the absence of words of revocation.

Incidentally, our Utah Court, in the case of:

In re *Love's Estate*, 75 Utah 342, 285 Pac. 299  
quotes at Page 301 the following from the ALR annotation above cited:

“From the time of earliest reported cases down to the present, the courts, English and American, have held that the execution of a will disposing of the entire estate of a testator in a manner absolutely inconsistent with the provisions of an earlier will revokes by implication the earlier will, though the will later in time contains no words of revocation, and no mention of the earlier will’ — and at page 669: ‘A holographic (or olographic) will containing no clause of revocation, but disposing of the whole estate inconsistently with a prior formal will, is a revocation of the former one.’”

In the case of:

*Pugh v. Parryman*, 58 So. 2d 117.

the Alabama Court says at Page 119:

“A will is in its very nature ambulatory, subject to revocation during the life of the person who signed it and is revoked by the execution of another will, unless the will expressly negatives an intention to revoke the prior will.”

The New York case of:

In re *Wuppermann's Estate*, 300 NYS 344.  
at 349 says:

“It is a rule of general application that if a later will makes a valid disposition of all of the testator's property it is inconsistent with the existence of any prior will, and without express words of revocation amounts to a revocation of all wills previously executed.”

To the same effect:

In re *Hunt's Will*, 81 NYS 2d 349;

In re *Marques' Will*, 123 NYS 2d 877.

In conclusion, it seems rather definite that Testatrix, when she executed the 1949 instrument, intended it to be truly her last and entire will. However, approximately five (5) months after she executed the 1949 instrument she inserted in a space therein at the bottom of page 6, the following:

“September 14, 1949, on September 7, 1949  
Mrs. Mildred M. C. Black Died. I wish the bequest to her (\$2,000.00) to be equally divided between her daughters, Mildred and Hilda.”

Claim may be made that this insertion served to republish or re-establish the 1939 and 1940 instruments. We believe the objection to any such contention lies in the

fact that such insertion obviously was merely stating the reason for what constituted an addition to the 1949 will.

An early English case:

*In the Goods of Dennis*, (1891) Probate 326 answered a like contention, which the Court summarized as follows:

“A testator executed a Will in 1867, and two codicils to it in 1869 and 1874. In 1875 he made another will, by which he expressly revoked all previous will and testamentary papers. Subsequently his two sisters, who were benefited by the codicil of 1874, and the will of 1875, died; and he made another codicil in 1881 disposing of the property which he had left to them—which he described as a codicil to his last will and testament—and which began in these words:

‘Whereas, my two sisters named in my codicil, dated May 12, 1874, are both since dead,’ etc.:—”

The Court stated that it was quite clear that the codicil, so far from expressing an intent to revive the previous codicil, contains evidence that there was no intention to revive it and, therefore, excluded it from probate.

Statement of reason for making the bequest does not constitute a republication of an earlier instrument.

*Blackett v. Ziegler*, 133 NW 901 (Iowa).

It would be entirely incongruous to contend that the 1939 instrument was republished by that of 1949, but that the 1940 instrument remained revoked. This very situation shows the fallacy of contending that the 1939



instrument, having been revoked, was at any time revived.

Respectfully submitted,

BEVERLY S. CLENDENIN  
and FABIAN, CLENDENIN,  
MOFFAT & MABEY,  
*Attorneys for Contestant-  
Respondents.*

## APPENDIX "A"

### 1949 INSTRUMENT IN RELATION TO 1939 INSTRUMENT

	1939 Instrument	1949 Instrument
Hilda Black .....	\$ 500.00	\$2,000.00
Mildred Black .....	500.00	2,000.00
Roger Black .....	500.00	2,000.00
Mrs. Isobel Budden.....	2,000.00	3,000.00
Ellen (Mrs. W. Lyon) Browne.....	500.00	1,000.00
Mrs. Dorothy Burleigh.....	3/20 residue	3/20 residue
Mrs. Helen Howard Duys.....	4/20 residue	3/20 residue
Mrs. Ethel Howard Forrest.....	3/20 residue	3/20 residue
Mrs. P. D. P. Hamilton.....	0	\$1,000.00
Mr. P. D. P. Hamilton.....	0	1,000.00
Dorothy Ogilvie Howard.....	0	1,000.00
Rosamond Lamb .....	\$1,000.00	2,000.00
McGill University .....	10,000.00	25,000.00
Henry Howard Petry .....	0	Small Island 2/20 residue
Protestant Board of School Comm....	\$2,000.00	\$3,000.00
Percy E. Radley.....	2,000.00	3,000.00
Miss Charlotte Smith.....	0	1,000.00
William T. Stewart.....	0	1,000.00
Lindsay Suter .....	0	2,000.00
Mary Stuart (Steward) Tinling.....	\$3,000.00	3,000.00

NOTE: Items listed are from 1939 and 1949 instruments only, since these are the only two that purport to be complete testamentary dispositions.